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IN THE

Supreme Court of the United States

October Term, 1979

No. 80-8

ROBERT T. EVANS,

Petitioner,

vs.

TONY E. MATNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the *Bakke* decision eliminate judicial construction and interpretation of Civil Rights Acts, including §1443 Removals, and substitute the Constitutional protection of equal protection of the laws?

2. Whether a right of Removal under §1443 is restricted to members of the black race, and possibly those with an Hispanic ethnic origin, and thus excludes members of the Caucasian race from the courts of the United States?

3. Whether the appellate court's *jurisdiction* to review the remand order extended to a review of defendant's right of removal under 28 U.S.C. §1441 in a case wherein the trial court has failed to grant a hearing, has denied the defendant due process, and has ordered a remand which was not in accordance with 28 U.S.C. §1447.

4. Does the opinion in and of itself unconstitutionally impose punitive measures and threaten the free and open use of the United States federal court system by American citizens and especially in this case threaten that group which is relatively weak by virtue of immature years?

5. Can a panel of United States Court of Appeals ever posses the power to punish a young American male citizen for removing a case under §1443 and/or §1441, especially without a hearing?

6. Are appellate procedures for the imposition of costs and attorney's fees for an alleged frivilous appeal subject to due process where the penalties are initially applied in the Tenth Circuit?

7. Does the opinion by singling out Civil Rights Removals for punitive measures discriminate in and of itself and does the Constitution forbid this?

8. Does the Tenth Circuit have the Constitutional right to make findings about what happened in state court and impose penalties upon petitioner based thereon?

9. Does the above violate the Tenth Amendment to the United States Constitution and Article II, Section 3 of the New Mexico State Constitution?

10. Are there ethical and Constitutional rights in civil rights removants against having their arguments falsely labeled as "totally lacking in merit" and stating that "it is clear from the record" when the record is not quoted nor supportive of judgmental assertions about motivation?

11. Is motivation for removal relevant?

12. Can Congress grant a Right of Removal, §1441, and then eliminate Constitutional protections of "due process" by saying that the remand is not appealable?

13. Is denial of oral argument evidence of lack of due process in this particular case at both federal levels?

PARTIES

Parties to the proceeding in the court whose judgment is sought to be reviewed were Tony E. Matney, Robert T. Evans and Roger Evans.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT	6
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	20
APPENDIX A Opinion of the United States District Court for the District of New Mexico	21
APPENDIX B Opinion of the United States Court of Appeals for the Tenth Circuit	22
APPENDIX C Petition for Rehearing	25
APPENDIX D Motion for Hearing	32
APPENDIX E Motion to Set Aside the Judgment	33

APPENDIX F 37
Order Denying Petition for Rehearing, Motion For Hearing and Motion to Set Aside the Judgment

APPENDIX G 38
Motion for Stay of Mandate

APPENDIX H 41
Order Staying Mandate

APPENDIX I 42
Order entered in *Holguin v. Dawson*

APPENDIX J 46
Petition for Removal

APPENDIX K 52
Motion for Remand

TABLE OF AUTHORITIES

CASES: *Page*

Dailey v. Elicker, 447 F.Supp. 436 (DC Colo. 1978) . . 16

Georgia v. Rachel, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966) 8, 11

Greenwood v. Peacock, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966) 11

Harmon v. Superior Court of California, 307 F.2d 796 (9th Cir. 1962) 15, 16

Midland Mortgage Co. v. Winner, 532 F.2d 1342 (10th Cir. 1976) 14

Thermtron Products and Newhard v. Hermansdorfer, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976) 14, 15

University of California Regents v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) . 11

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment 5 5

United States Constitution, Amendment 10 . . . . . 6, 17

United States Constitution, Amendment 14 6

New Mexico State Constitution, Article II, §3 . . 6, 17, 18

STATUTES:

28 U.S.C. §1441 ..... 2, 7, 9, 13

28 U.S.C. §1443 ..... 3, 7, 9, 10, 12

28 U.S.C. §1446 ..... 3, 7

28 U.S.C. §1447 ..... 4, 7, 8, 13, 14

42 U.S.C. §1981 5

42 U.S.C. §1983 5

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Robert T. Evans, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit filed on April 24, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was not reported. This opinion appears as Appendix B, infra. The order entered by the United

States District Court for the District of New Mexico was not accompanied by an opinion and was not reported. This order appears as Appendix A, infra.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit was filed on April 24, 1980. Defendants-Appellants thereafter filed a Petition for Rehearing, Motion for Hearing and Motion to Set Aside the Judgment, all of which were denied by the Court on May 22, 1980. Defendants-Appellants also filed a Motion for Stay of Mandate, which was granted on June 3, 1980.

This Court has jurisdiction of this cause under 28 U.S.C. §1254, as this is a Petition for Certiorari from a case in the United States Court of Appeals for the Tenth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"28 U.S.C. §1441(a) and (b). Actions Removable Generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United

States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

"*28 U.S.C. §1443. Civil Rights Cases.*

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

28 U.S.C. §1446(a) and (b). Procedure for Removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for

relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not requied to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

"*28 U.S.C. §1447. Procedure After Removal Generally.*

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443, of this title [28 U.S.C.S. §1443] shall be reviewable by appeal or otherwise."

"42 U.S.C. §1981. Equal Rights Under the Law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

"42 U.S.C. §1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

United States Constitution, Amendment 5:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment 14, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Amendment 10:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

New Mexico Constitution, Article II, §3:

"The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state."

STATEMENT

On October 8, 1976, an accident occurred involving an automobile driven by Robert T. Evans, a fifteen-year old licensed Caucasian minor, and a bicycle ridden by plaintiff Matney. Detailed facts are omitted because they are irrelevant to the issues in the federal system. This is because the youth, Robert T. Evans, removed the case under 28 U.S.C. §1441 *and* §1443.

The Petition for Removal was filed on Friday, October 26, 1979. On Monday, October 29, 1979, Plaintiff-Appellee filed a Motion for Remand and remand was ordered within a few hours of the filing of the Motion. It was done

summarily and without a hearing of any kind. Defendant-Appellant was offered no opportunity to argue the issue of the removal, nor did this summary treatment allow any record to be made as to anything connected with the removal. In the light of the above, we are at a loss to understand how the Tenth Circuit opinion can state, "It is clear from the record that this appeal is frivilous, vexatious and brought for the purposes of delay." There is contained in the Order of Remand the language of 28 U.S.C. §1447(c) about an improvident removal. Without a hearing of any kind, we question that Congress did or even intended to make §1447(d) applicable to this case, for to do so would be to create a grounds for removal and at the same time deny the application of Constitutional due process.

Because no hearing occurred ever in the Removal under either §1441 or §1443, the time of removal as stated in §1446 was never considered. However, since phrases like "it is clear from the record" (Tenth Circuit Opinion) and "the removal procedures were not timely followed" and "the action was removed to this court improvidently and without jurisdiction" (United States District Court Remand Order) imply that there was a record, we struggle to disavow these assertions. In particular, for the United States District Judge to conclude that the Removal was not timely, and to do this immediately and without a hearing, is not only a lack of due process but shows an unfamiliarity with the Petition of Removal.

It is noteworthy that the date alleged in the Removal Petition on which the Removal was based was not the date of the Amended Complaint but the date the state trial judge ordered petitioner Robert T. Evans to go to trial to defend against the Amended Complaint, which it was

alleged had never been served on him. Timely removal was therefore alleged since the date of the Removal was within 30 days of the Order.

The opinion erroneously states that the father is the petitioner when it states, "Evans contends his son." Robert T. Evans was the removal petitioner and the father, Roger S. Evans, joined in the removal. The last paragraph of the opinion awards damages against the petitioner who would be the son, and uses the term "damages."

The record contains a number of pleadings from the state court which were put into the transcript on appeal but were not present when the United States District Judge remanded the case. There were no further proceedings in the United States District Court after the Remand. Even if these are considered applicable for review by the Tenth Circuit panel, we assert that there is no basis for the conclusions about what the record clearly states. The case was appealed on the very day of the Order of Remand, October 29, 1979. 28 U.S.C. §1447(d) granted jurisdiction to an appeal after a remand of a removal under §1443. On April 24, 1980, the Tenth Circuit Court of Appeals filed its judgment and opinion in this cause.

So clearly did the Tenth Circuit place their opinion on the basis of race that they even underlined the word "racial" as it appears prior to the word "discrimination." The Tenth Circuit opinion, which denied entry to Robert T. Evans into the federal system because of race, rested entirely on the case of *Georgia v. Rachel*, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed2d 925 (1966).

The opinion discussion on Removal under §1443(2) appears immaterial to the allegations of the Removal Petition.

In regard to §1441, the opinion denies that it has jurisdiction, although the opinion does not expressly even mention that we also removed under §1441. The opinion denial of removal as to §1441 is stated as follows: "This court has jurisdiction to review district court orders remanding a case to state court *only* when the case was removed to federal court pursuant to 28 U.S.C. §1443." (emphasis supplied)

The last paragraph of the opinion contains no legal decisions. It is a sanctions paragraph and states that the Appeal was improper and was brought for purposes of delay. Attorney's fees were assessed against Appellant and double costs. A request for Rehearing was denied, and a Motion to Set Aside the Judgment Entered Against Appellant and Motion for a Hearing were all denied. Motion for Stay of Mandate so that certiorari could be filed in this Court was granted.

Grave concern is felt because this opinion has been used in another removal case in the United States District Court for the District of New Mexico, where on May 6, 1980, only 12 days after this opinion came down, this opinion and its harsh penalties were made the basis for an award of $350.00 as costs against the attorney who represented the petitioner in this case. The United States District Court Judge Edwin L. Mechem said in the language of the Tenth Circuit panel, "I conclude that defendant's petition for removal is frivilous, vexatious and brought for the purposes of delay." United States District Judge Mechem also says,

"Additionally I note that this is not the first time that counsel for defendant has attempted the same tactic to avoid an imminent trial setting in the State District Court. See *Matney v. Evans*, No. 79-2153 (10th Cir., Apr. 24, 1980)." Judge Mechem also says "that the Petition for Removal was filed in bad faith and for purposes of delay." See Appendix for this opinion filed in United States District Court for the District of New Mexico on May 6, 1980. (Appendix I). This matter is now on appeal to the Tenth Circuit (cause numbers 80-1584 and 80-1585).

Also, on June 19, 1980, a Complaint for Abuse of Process was filed in Grant County, New Mexico against the defendant and petitioner for removal in Appendix I for 2.6 million dollars. This Complaint claimed the abuse of process was the removal of Appendix I by the defendant Dawson. The cause number was CV-80-080 of Grant County, New Mexico. More such Complaints based on the instant case can be anticipated in the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

Bakke Overruled Race Discriminations in §1443.

It is not disputed that the defendant in this case is neither black nor Hispanic. However, the protection of "equal rights" has not been and must not be limited to racial civil rights.

The provisions of 28 U.S.C. §1443 are before the Court for interpretation, *supra.* The language of §1443 does not restrict the courts to one aspect of civil rights, but rather opens the door to all violations of "equal civil rights" or "equal rights." This statute, on its face, encompasses all types of discrimination, including discrimination based on

sex and age. However, this statute has been so restrictively construed by the courts as to limit its definition of "equal rights" to *racial* civil rights. *Georgia v. Rachel*, 384 U.S. 780, 86 S.Ct. 1783, 16 L.Ed2d 925 (1966); *Greenwood v. Peacock*, 384 U.S. 808, 86 S.Ct.1800, 16 L.Ed2d 944 (1966). This construction, however, must be questioned in light of subsequent cases and developments.

The summary dismissal of this Appeal in the Tenth Circuit was based on the absence of a claim of "racial discrimination" in the removal, as was required in *Georgia v. Rachel, supra.* The assertion in the opinion that the appeal was without merit was based on the fact that Robert T. Evans was not a person of the black race, nor did he have an Hispanic heritage. It is submitted that this opinion and judgment, per se, violated Appellant's Constitutional and civil rights.

University of California Regents v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed2d 750 (1978) had not yet been decided at the time the restrictions in *Georgia v. Rachel, supra* and *Greenwood v. Peacock, supra* were laid down, and it is submitted that the *Bakke* decision mandates an overruling of those two cases. The majority opinion in *Bakke* makes a decisive statement of Constitutional law at 98 S.Ct. at 2757:

> "Preferring members of any one group for any reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

This language is not an abstraction but an explanation of the reality of what happened in this opinion to Robert T. Evans, a citizens of the United States. He was the subject of discrimination for the sake of discrimination within the appeal process.

The Civil Rights Removal Act, 28 U.S.C. §1443, was a document asserting equality; however, *Rachel* and *Peacock* wrongfully changed its plain meaning, which clearly states "equal civil rights of citizens of the United States," and made it a discriminatory statute by unwarranted judicial statutory construction. The effect of *Bakke* is to necessarily eliminate the restrictions of the interpretations of *Rachel* and *Peacock* and restore §1443 to its original, expressed clear-cut inclusion of all "citizens of the United States." *Bakke* demonstrates that the restrictions of "race" written into §1443 by *Rachel* are themselves unconstitutional.

It is submitted that the right of removal set forth in 28 U.S.C. §1443 must be held to extend to all situations in which discrimination exists or equal rights have been violated, and not be restricted so as to benefit only a single racial group. Defendant Robert T. Evans was therefore entitled to removal under this statute.

The essence of this Petition for Certiorari is contained in the application for stay of the mandate of the petitioner Robert T. Evans, a nineteen-year old Freshman at Fresno State, written in his own hand. The assertions in the application for stay of the mandate are his. Petitioner's statement reads, "I clearly read that your opinion states that a particular race only qualifies for admission into the federal judicial system." Petitioner goes on to say that rcae means nothing "as far as admission into California's Universities is concerned," and he respectfully requests the Tenth Circuit to "give me the chance to see if the Supreme Court will recognize me . . . as being equal with another race." He concludes by an appeal to the use of "principles" and a hope for its "triumph." The Tenth Circuit opinion in its last paragraph treats this petitioner

as a delinquent. All legal issues were decided in prior paragraphs. Nothing remains to be done but to affirm as in a normal appeal. But *no*, we see an angry panel of judges imposing sanctions for this nineteen-year old for bringing this Appeal. When we reflect that the basis of the decision was that the petitioner was disqualified for lack of racial qualifications, we are at a complete loss to understand why they selected *this* Appeal for such harsh penalties.

§1441 Requires a Hearing and the Court of Appeals Has Review Jurisdiction.

The availability of appeal from a remand order is set out in 28 U.S.C. §1447:

> "(d) An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443, of this title [28 USC§1443] shall be reviewable by appeal or otherwise."

Since this cause was removed pursuant to 28 U.S.C. §1443, the right to appeal is guaranteed by statute, and Robert T. Evans clearly has the right to pursue this appeal.

Further, it is submitted that this appeal was proper even insofar as it pertained to the removal under 28 U.S.C. §1441. The United States Supreme Court has made it clear that the limits on appeal in 28 U.S.C. §1447(d) are not absolute. A district court may not abuse its power by ordering a remand for reasons not authorized by statute, and still remain insulated from review by the provisions of §1447(d).

In *Thermtron Products and Newhard v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), the Supreme Court allowed an appeal of a remand order although the removal had not been pursuant to 28 U.S.C. §1443. In that case, the federal district judge had remanded the case for reason that "there is no available time in which to try the above styled case in the foreseeable future." The Supreme Court allowed the appeal, holding that "a case may be removed only in accordance with §1447 which governs procedure after removal." Since the remand which was ordered by the District Court had gone beyond the authority of §1447, the remand was held improper and the appeal was allowed.

Now that the federal judges have been alerted by *Thermtron*, it seems unlikely that this exact situation will arise again, and that a Court would fail to couch its remand order in the terms set out by the statute: "improvidently and without jurisdiction." Yet the use of this stock phrase cannot excuse the courts from the duty set down in *Thermtron* and 28 U.S.C. §1447, that being the duty to evaluate each case carefully and remand only when such a careful evaluation does reveal that a case has been removed "improvidently." When the *facts* of the case support an inference that the court "was clearly remanding the suit on grounds specified in 28 U.S.C. §1447(c)", such remand cannot be questioned on appeal. *Midland Mortgage Co. v. Winner*, 532 F.2d 1342, 1344 (10th Cir. 1976). However, where the facts as set out in the petition for removal plead a valid basis for removal, and where no hearing is held which would allow the presentation of factual evidence and argument, the District Court cannot take it upon itself to remand the case without a reason supportable by the statute, and then insulate itself behind a repetition of the proper

phrase. There is no support in the record for the order of remand in this case. Indeed, due to the lack of a hearing, there is very little "record" in existence.

Further, both *Thermtron* and the principles of due process were violated by the summary manner in which this remand occurred. The Petition for Removal was filed on Friday, October 26, 1979. On Monday, October 29, 1979, plaintiff filed a Motion for Remand. On that same day, the federal district judge summarily ordered that the cause be remanded, without a hearing and without an opportunity for presentation of facts and arguments. Such summary action was clearly improper.

In *Harmon v. Superior Court of California*, 307 F.2d 796, 798 (9th Cir. 1962), the Court made it very clear that an evidentiary hearing is absolutely required when a determination is made as to the validity of a civil rights claim. In this regard, the Court stated as follows:

> "Appellant has attempted, however imperfectly, to state a claim under acts of Congress that expressly give the District Court jurisdiction.
>
> *****
>
> The claim may be, as appellees assert, entirely spurious. The Complaint may well not state a claim upon which relief can be granted. But those are not the questions before us. *The court cannot know, without hearing the parties,* whether it may be possible for appellant to state a claim entitling him to relief, however strongly it may incline to the belief that he cannot." (emphasis added).

Thus, an evidentiary hearing was required prior to any determination concerning the civil rights issue.

Further, a hearing must be granted even in situations wherein the issue is jurisdictional. In *Harmon v. Superior Court of California, supra,* the court held as follows, at 797:

> "But it [the district court] cannot dismiss for lack of jurisdiction, *without giving the plaintiff an opportunity to be heard,* unless such lack appears on the face of the complaint and is obviously not curable." (emphasis added).

In the case now before the Court, jurisdiction did exist, and the petition was timely filed. However, even if it were assumed, arguendo, that a question did exist as to jurisdiction and timely filing, then an evidentiary hearing would nevertheless be required to resolve the factual issues relating to these questions. A federal court may not "pretry" any doubtful issues of fact to determine removability. *Dailey v. Elicker,* 447 F.Supp. 436 (DC Colo. 1978). Yet, only by so doing could the court have reached the result herein, and a hearing should therefore have been granted.

Summary dismissal, without a hearing, was not authorized in this situation. The speed with which this decision was reached argues against a proper and careful consideration of the issues involved. Jurisdiction was not lacking on the face of the record, and a civil rights question was raised by the Petition for Removal. Clearly, the denial of a hearing was impermissable.

The Opinion Invaded State Power by Passing Judgment that the Appeal was for Purposes of Delay.

The conclusion by the panel of the Tenth Circuit Court of Appeals comprised of Judges Barrett, McKay and Logan

that the Appeal was filed for purposes of delay, and that therefore attorney's fees and double costs totaling $1,000 should be imposed, is challenged on Constitutional grounds as well as others. See the Tenth Amendment to the Constitution of the United States:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Also see Article II, §3 of the New Mexico State Constitution:

> "The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state."

The last paragraph of the Opinion makes assertions about the case of *Matney v. Evans* when it was in the state court of New Mexico, and specifically refers to "more than two years" occurring between filing of suit and filing of removal. The opinion also states that "only four days before state court trial was to begin on the damages question" did removal take place.

The "damages" awarded to appellee were the result of the conclusion stated as follows: "It is clear from the record that this appeal is frivilous, vexatious and *brought for the purposes of delay.*" (emphasis supplied). It would be reasonable to associate the "delay" motivation allegation with the state trial in New Mexico. Therefore, the opinion considered the occurrences of *Matney v. Evans* in the state court of New Mexico as a basis for awarding "damages." This, we believe the Constitution of the United States of America, Tenth Amendment, and the Constitution of the State of New Mexico, *supra,* forbid.

The "purposes of delay" is meaningless without a Court of Appeals finding of the time period that the case was a New Mexico state court case. This, we submit, is beyond the Constitutional power of the United States Court of Appeals for the Tenth Circuit under the separation of powers provided for by the Constitution.

The County in New Mexico where the case was filed and where it was pending was Bernalillo County, and the State of New Mexico trial judge at the State District Court level was Judge James Maloney.

The Honorable James Maloney did not request nor does the United States Court of Appeals or any judges therein have the Constitutional power to make findings relative to delay of civil cases in Bernalillo County, New Mexico.

Since the "delay" referred to in the opinion refers to a state court trial, we assert that exclusive jurisdiction resides with the state court system to judicially manage the same and to make whatever decisions are deemed necessary, including possible inquiries into reasons why parties and their attorneys ask for or secure continuances. Interference therein by federal officials constitutes an unlawful, unconstitutional interference in the internal affairs of the State of New Mexico. See Article II, §3 of the New Mexico Constitution, *supra.*

We are aware that the "damages" awarded were stated to be based on a Court of Appeals Rule; however this Rule must function within Constitutional limitations. The last paragraph of the opinion, which makes the conclusion or charge of "delay" motivation, is based on findings of a

presumed delay in a trial of the state suit. Therefore, the "damages" logically have reference to a time period applicable to the trial of a civil case in the District Court of New Mexico, over which the Honorable James Maloney had jurisdiction exclusionary as to the federal court judges relative to the matters, which the opinion made the basis of its finding of delay and on which its damages to appellee and against appellant were based.

The opinion's last paragraph contains an attempted justification for the sanctions which start with the bare, unsupported assertion about all of appellant's arguments as being "totally lacking in merit." Later assertions indicate that the panel had in mind the motivation of the removal rather than the merits of the removal, for which there was never a hearing. The opinion accusations are false and imply that the record contains an abundance of evidence substantiating the evils for which the petitioner is charged. It is an attempt to discredit by attacking motivation rather than to evaluate the issues. The case cited is not a true authority. See Appendix E for motion to set aside where the case is discussed. Even though the opinion is not to be published routinely, Judge Mechem got news of the panel's accusations. Appendix I.

Those who dared to exercise their right to remove under §1441 and §1443 not only did not get a hearing on the merits of their Removal, but they were also charged and convicted of evil intent without notice or a hearing.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should be granted to review the opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully Submitted:

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Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TONY E. MATNEY,

Plaintiff,

-vs- No. CIV 79 828 M

ROGER EVANS, individually and as father and next friend of ROBERT T. EVANS, a minor,

Defendants.

Entered on Docket
Oct. 29, 1979

ORDER

The above-entitled action having come on before the Court, and the Court being of the opinion that the action was removed to this Court improvidently and without jurisdiction, for the reason that the removal procedures were not timely followed, and for the further reasons which are set forth in the affidavit attached to the Motion.

IT IS HEREBY ORDERED that the above-entitled action be, and it is hereby, remanded to the Second Judicial District Court of Bernalillo County, State of New Mexico.

E. L. MECHEM
United States District Judge

APPENDIX B

4-24-80 79-2153

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Slip Opinion

Not for Routine Publication

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

TONY E. MATNEY,

Plaintiff-Appellee,

v. No. 79-2153

ROGER EVANS, individually and as father and next friend of ROBERT T. EVANS, a minor,

Defendants-Appellant.

Appeal from the United States District Court
For the District of New Mexico
(Civ. No. 79-828-M)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Eugene E. Klecan and Wendy M. Bickel, Klecan & Roach, Albuquerque, New Mexico, for Defendants-Appellants.
Paul W. Robinson, Robinson, Stevens & Wainwright, Albuquerque, New Mexico, for Plaintiff-Appellee.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

PER CURIAM

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). This cause is therefore ordered submitted without oral argument.

As a result of a car-bicycle accident appellee Matney brought suit in a New Mexico state court against appellant Roger Evans as father and next friend of Robert T. Evans. Evans subsequently removed the action to the district court pursuant to 28 U.S.C. § 1441(a) (b) and (c) and 28 U.S.C. § 1443. The district court promptly remanded the action to the state court. Evans has appealed that remand order and Matney has filed a Motion to Affirm.

This court has jurisdiction to review district court orders remanding a case to state court only when the case was removed to federal court pursuant to 28 U.S.C. § 1443. *See* 28 U.S.C. § 1447(d). We therefore limit our review to appellant's contention that he was entitled under the provisions of 28 U.S.C. § 1443 to remove this case to district court. *See* Noel v. McCain, 538 F.2d 633 (4th Cir. 1976).

In support of his petition for removal under 28 U.S.C. § 1443, Evans contends his son was deprived of equal civil rights because he was a male and a minor. Even assuming these allegations to be true, neither subsection of the statute contemplates removal of actions from state court to federal court under these circumstances.

One of the requirements for removal under 28 U.S.C. § 1433(1) is that the defendant show a deprivation of rights guaranteed by a law protecting against *racial* discrimination. Georgia v. Rachel, 384 U.S. 780 (1966); State of New Mexico v. Torres, 461 F.2d 342 (10th Cir. 1972). The statute does not authorize removal to protect the broad guarantees

of the Constitution. Naugle v. State of Oklahoma, 429 F.2d 1268 (10th Cir. 1970). There is no allegation or evidence of racial discrimination in the record.

The removal provisions of 28 U.S.C. § 1443(2) are available only to federal officers and persons assisting such officers in affirmatively executing duties under any federal law providing for equal civil rights. Greenwood v. Peacock, 384 U.S. 808 (1966). Appellant falls in neither category.

Evans filed his petition for removal more than two years after this action was instituted in state court and only four days before state court trial was to begin on the damages question. The arguments advanced by Evans on appeal are totally lacking in merit. It is clear from the record that this appeal is frivolous, vexatious and brought for the purposes of delay. We therefore award to appellee damages to the extent of attorney's fees in the amount of $500 and double costs. *See* Peltier v. Peltier, 548 F.2d 1083 (1st Cir. 1977); 28 U.S.C. § 1912; Fed.R.App.P. 38. The motion of appellee is granted and the judgment of the district court is affirmed.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TONY E. MATNEY,

Plaintiff-Appellee,

vs. No. 79-2153

ROGER EVANS, individually and as father and next friend of ROBERT T. EVANS, a minor,

Defendants-Appellant.

PETITION FOR REHEARING

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PETITION FOR REHEARING

The *Bakke* case, 98 S.Ct. 2733, expresses the soul of America which espouses "equality" as its most cherished objective. That equality includes all institutions within its scope. *Bakke, supra,* was a judicial culmination of a con-

tinuing movement in and out of courts for equality. This equality is sought consciously and subconsciously throughout America's history from the very beginning and had been building up for a considerable period of time within a movement that has been legislatively and properly denominated as civil rights and remedies. *Bakke, supra,* represented a public expression of a national movement and is merely one of numerous expressions of an inherent national, natural tendency that far transcends legalisms of all sorts. Occurring in 1978, it represented a forward movement approved by the Supreme Court of the United States which was a step forward toward equality from 1966. *Bakke, supra* was popular and cherished in the main long before its appearance as a judicial decision. The Declaration of Independence, the Constitution of the United States of America, the Emancipation Proclamation, and the Thirteenth and Fourteenth Amendments to the United States Constitution all are documents of equality. For purposes of this rehearing we submit that *Bakke, supra* constitutes a national environment, together with many other factors, which differs from the Constitutional environment of 1966, when *Georgia v. Rachel*, 384 U.S. 780, 86 S.Ct. 1783, 16 F.2d 925 and *Greenwood Mississippi v. Peacock*, 384 U.S. 808, 86 S.Ct. 1800, 16 F.2d 944 were denied.

The Civil Right Removal Act, 28 USC §1443, was a document asserting equality like the Declaration of Independence; however, *Rachel* and *Peacock* wrongfully changed its plain meaning which clearly states "equal civil rights of citizens of the United States" and made it a discriminatory statute by unwarranted judicial statutory construction. *Bakke* changed that and merely eliminates the restrictions of the interpretations of *Rachel* and *Peacock* and restored §1443 to its original, expressed clear-cut inclusion of all "citizens of the United States." *Bakke* did this by declaring that the restrictions of "race" written into §1443 by *Rachel* were themselves unconstitutional. Justice Powell ably phrased the heart of the memorable *Bakke* Majority Opinion as follows at p. 2757: "Preferring members of any

one group for no other reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids, citing cases." Even without *Bakke*, the forced interpretation of *Rachel* which "wrote in" discriminatory language where none was contained in the Act itself argued for a "dissent" from some litigants like the instant minor male plaintiff, who would inherit the American sense of "equality" which is the reverse of discrimination. Turning to "lawyers" whose choice of remedies for and in behalf of their clients is not determined by an inexorable scrupulous following of a rigid inflexible *stare decisis* but is determined by the Canons of Professional Responsibility which allows a lawyer to represent his client by the advancement of his Constitutional rights even though a decision apparently exists to the contrary. If an attorney or his client is forced to pay attorneys fees and double costs for advancing the same rights as others can advance of a different race then the Constitutional provision of equal protection of the laws is thwarted. Fourteenth Amendment. When a party and his attorney believe that "discrimination" has occured as to a class in which the client belongs, then a further belief that he should not be disqualified because of the color of his skin or his ethnic background from a hearing in Federal District Court on the allegations of discrimination contains a strong element of Constitutional truth. So says *Bakke*. When a suggestion that we reexamine Rachel is not only denied but penalized, we have an imposition of an inexorable rigidity at variance with the essentials of *stare decisis* which of its very nature provides for change. Courts do not institute their own causes of action, and if justiciable cases are penalized when they use the inherent essential of *stare decisis* by requesting change, then the very doctrine is self-destructive.

Further, a potential deterrent to the use of Federal Courts by citizens at the trial and appellate levels is violation of the "due process" clause of the Fourteenth Amendment. When a rigid inflexible *stare decisis* is imposed

through the imposition of a judgment rendered at the appellate level against the party suggesting a change and that without any hearing or finding of fact and by an unidentified reference to the "record" which the trial judge did not allow time to gather, then Constitutional rights are again invaded.

It is questionable whether *Rachel* as to its restriction to race was not "dicta." Civil rights removal was recognized in the *Rachel* decision, and that decision does prohibit a Remand without a hearing; and the lower court in New Mexico can find support only in a lack of allegation of racial discrimination on which *Bakke* and §1443 both say is not necessary as to the "racial" word under "equal civil rights" and "equal protection of the laws." We think to have requested the elimination of the language of *Rachel* and the application of the *Rachel* decision is not only a permissible Constitutional stance by Robert Evans and his attorney but even a highly commendable one and also one that is meritorious as *Bakke* clearly holds.

We indicated one of our objections in our brief to this Court (p. 14, top paragraph, Appellant's Brief). In addition, although not mentioned in the Court's Opinion, removal was also based upon 28 USC §1441, and our brief refers to 42 USC § § 2651—2653 as the federal statute authorizing removal under § 1441(b). As we pointed out at p. 16 of our brief, this had not even been disputed or even discussed by Plaintiff-Appellee. It would appear that the Opinion herein not only accepted Plaintiff-Appellee attorney's unsupported assertions that Appellant's motivation, which was clearly irrelevant, but also followed Appellee in overlooking the removal under §1441. The advancement of Supreme Court decisions referred to above has also taken place in regard to §1441, and in particular 28 USC § 1447 which deals with appealability of a remand. The case referred to in our brief was *Thermtron Products, Inc, v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 LEd2d 542 (1976). The failure of the lower court to grant a hearing and its

immediate issuance of a remand with no opportunity to comply with the Local Rule of the Court for transfer of State Court records are relevant circumstances and were briefed (p. 17, et seq.). *Thermtron, supra* lends further substance to this Petition for Rehearing, both as to the ruling on the Appeal and the open assertion of delay as motivation. See *University of Illinois Law Forum*, 1977, p. 1086, wherein *Thermtron, supra* is discussed in an article entitled "Remand Order Review After Thermtron Products." This article indicates a supporting opinion from University of Illinois that review under § 1447 is not outmoded under circumstances existing in this case. An assurance that an appeal effort will prevail has never been considered as a requisite to a well-intentioned appeal. Attorney responsibilities for legal measures are in the Code of Responsibility and makes actions in behalf of clients permissible and perhaps mandatory, even though the outcome is, of course, out of the hands and control of the attorney. Prevailing changes in the life of a country can authorize a non-following of *stare decisis.* We find no *stare decisis* in *Thermtron* as applied to the facts of this particular case which have been stated above and in our brief. Based on *Thermtron, supra*, we are of the conviction that under the Code of Responsibility a review in an appellate court could be required, and opposing attorney's unfounded assertion of another type of motivation would be not only irrelevant but also a non-recognition of the nature of legal representation in the practice of law.

In conclusion, since the damages awarded are based on an unquoted and non-cited record which the Court says is clear, we assert error of the judgment. Since a question sometimes has been raised that claimed error must be brought to the attention of the Court awarding damages, we submit the point to the attention of this Court which has awarded damages. The only place appellant can find any basis for the "delay" motivation is appellee attorney's statements in his brief. Assertions of counsel have never been considered evidence. This Court cites *Peltier v. Peltier*,

548 F.2d 1083 (1977) in support of its judgment; however, the judgment in that Court was by the *Trial Court* based on a "finding of bad faith" and the Opinion indicates there was a *hearing*, p. 1084, at the trial level. At least the appellant's attorney had a chance to convince the Court at the trial level as to what the State Court proceedings showed and to explain his own motivation and to be informed that it was under scrutiny. In our case, although the Opinion does not mention this, the State Court proceedings were not allowed to be presented as provided by the District Court Rule before the Trial Judge immediately remanded the case. The basis for *Peltier* award of damages was the nature of the action removed, not being removable, i.e. divorce.

In our case, the Trial Court did not find that the Removal was brought for the purposes of delay.

In regard to the last paragraphs of the Opinion, Appellant submits as a preliminary premise that Constitutional rights are in a higher category than technical legal rules, like the number of witnesses required for will validity. Equality is a Constitutional right. It does not arise as a gift from any governmental body but inheres in the citizen as an attribute of their very lives. Declaration of Independence. When a citizen becomes a litigant, he does not lose his Constitutional rights. Appellant Robert Evans and his attorneys did not remove the case into the federal system because they wanted to delay, despite appellee's assertions to the contrary. The above has to do with motivation, which is irrelevant to this whole Removal and Remand and Appeal and hearing. Since motivation is personal, we know with certitude *that the purpose of the Removal was to obtain another forum than the State of New Mexico forum.*

EUGENE E. KLECAN
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Attorneys for Defendants-Appellant
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I hereby certify that a true and correct copy of the foregoing Petition for Rehearing was served on opposing counsel of record this 7th day of May, 1980.

WENDY M. BICKEL

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TONY E. MATNEY,
Plaintiff-Appellee,

vs. No. 79-2153

ROGER EVANS, individually and as father and next friend of ROBERT T. EVANS, a minor.
Defendants-Appellant.

MOTION FOR HEARING

COMES NOW Appellant and hereby moves the Court to set a date for a hearing on Appellant's Motion to Set Aside Judgment entered herein against Appellant for attorneys fees of five-hundred dollars ($500.00) and double costs, whereby Appellant can be represented by counsel and afforded an opportunity to be heard.

EUGENE E. KLECAN
Klecan & Roach, P.A.
Attorneys for Appellant
Suite 520, Sandia Savings Building
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I hereby certify that a true and correct copy of the foregoing Motion was served on opposing counsel of record this 8th day of May, 1980.

WENDY M. BICKEL

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TONY E. MATNEY,
Plaintiff-Appellee,

vs. No. 79-2153

ROGER EVANS, individually and as father and next friend of ROBERT T. EVANS, a minor,
Defendants-Appellant.

MOTION TO SET ASIDE THE JUDGMENT ENTERED HEREIN AGAINST APPELLANT FOR ATTORNEYS FEES OF FIVE-HUNDRED DOLLARS ($500.00) AND DOUBLE COSTS, WHICH WAS ENTERED WITHOUT A HEARING OR EVIDENCE OF ANY KIND.

COMES NOW Appellant, Robert T. Evans, and states in support of this Motion that:

1. This cause in this Court is an Appeal under the Civil Rights Appeal Statute from the United States District Court for the District of New Mexico.

2. That in an Opinion entered in this Court which granted Appellee's Motion to Dismiss Appellant's Appeal, the panel of the Court of Appeals has directed the entry of a Judgment against Appellant for attorneys fees of five-hundred dollars ($500.00) to be awarded to Appellee and double costs of an additional five-hundred dollars ($500.00). The Opinion is not signed by any one Court of Appeals Judges, but said Opinion states that a panel of Justice Barrett, Justice McKay and Justice Logan agreed unanimously on the Opinion.

The Judgment stated above was without any hearing in this Court or in the United States District Court for the District of New Mexico, either. Appellee did not ask for any sanctions or attorneys fees, and no hearing of any kind has occurred; nor have any affidavits or evidence of any kind been sought or furnished by anyone relative to the imposition of any type of sanctions against the Appellant.

That the penalties of five-hundred dollars ($500.00) attorneys fees and double costs are not provided for in the statute dealing with the appeal taken by the Appellant under the Civil Rights Act.

That the sole basis claimed for the award is a Rule of Court of the Tenth Circuit.

That to do so without a hearing, without notice that sanctions and penalties were even being considered by this panel of the Tenth Circuit Court of Appeals and without any background in the United States District Court for the District of New Mexico and without any opportunity to defend in any way constitutes the entry of a Judgment by the Court of Appeals which is in violation of the Appellant's due process rights.

That for Appellant to be thus adjudged in such a proceeding which was completely secret as to any of the parties to this Appeal has been to deprive Appellant of his most fundamental Constitutional rights.

The Opinion says that the panel of three United States Circuit Court of Appeals Judges were all three unanimous. This necessarily implies that a judicial meeting was held with no evidence presented or opportunity for defense afforded, and that the Judgment described above resulted. Appellant asserts that the said result is without a Constitutional basis and in violation of Appellant's most fundamental right as a citizen of the United States of America. Not only was the Judgment without a hearing and an op-

portunity for defense or explanation, but in addition no Notice was ever given that this panel would on its own and unannounced enter into a judicial session where no one was present who could speak in behalf of the Appellant Robert T. Evans. In fact, the opposing party was not present, with the result that the deliberations wherein the Appellant was subjected to a Judgment, were entirely governmental functions. Appellant asserts that citizens of the United States have Constitutional rights which were not observed. That Appellant asserts the right to assert this alleged violation and verily believes that this Court has no authority to have thus proceeded for the purpose of entering a Judgment against the Appellant Robert T. Evans. The existence of a Court Rule does not authorize proceeding in the manner described above.

That Appellant also asserts that the Judgment and the proceedings from which the Judgment emanated were in violation of his civil rights and the "equal protection of the laws" under the Fourteenth Amendment of the Constitution of the United States of America, and that said proceeding as described above was a discrimination against him, Robert T. Evans, as a citizen of the United States of America. *Regents of the University of California v. Allan Bakke*, 98 S.Ct. 1978.

The summary dismissal of this Appeal, which was filed as a Civil Rights authorized Appeal in the Tenth Circuit Court of Appeals, was based on the absence of a claim of "racial discrimination" in the Removal, and the cause of *Georgia v. Rachel*, 384 U.S., 780, 86 S.Ct. 1783, 16 F.2d 925 was cited in support of the dismissal. Appellant Robert T. Evans is in fact Caucasian and claims no Hispanic ethnic background. The assertion in the Opinion of a total lack of merit to the Appeal and the cause for the wholly judicial, non-evidentiary Judgment against the Appellant Robert T. Evans was the fact that Robert T. Evans was not a person of the Black race, nor did he have an Hispanic heritage.

The Opinion and the Judgment, per se, violated Appellant's Constitutional and civil rights, *Bakke, supra* places the Constitutional violation as one of a denial of the "equal protection of the laws." That said Amendment in *Bakke* was the Fourteenth Amendment, but the Bill of Rights gives to citizens of the United States the same rights and the same protection from the actions of the Federal Government as does the Fourteenth Amendment in relationship to the State.

The Majority Opinion in *Bakke* says as the decisive statement of Constitutional law, p. 2757 in 98 S.Ct.: "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." This language is not an abstraction but an explanation of the reality of what happened in this Opinion to Robert T. Evans, a citizen of the United States. He was the subject of discrimination for the sake of discrimination within the appeal processes and the resulting judgment.

EUGENE E. KLECAN
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505/243-7731

I hereby certify that a true and correct copy of the foregoing Motion was served on opposing counsel of record this 8th day of May, 1980.

WENDY M. BICKEL

MAY TERM - May 22, 1980

Before Honorable James E. Barrett, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges, United States Court of Appeals

TONY E. MATNEY,

Plaintiff-Appellee,

vs. No. 79-2153

ROGER EVANS, individually
and as a father and next
friend of ROBERT T. EVANS,
a minor.

Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing, motion for hearing and motion to set aside the judgment. Upon consideration thereof, the petition and both motions are denied.

HOWARD K. PHILLIPS
Clerk
By ROBERT L. HOECKER
Chief Deputy Clerk

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TONY E. MATNEY,

Plaintiff-Appellee,

vs. No. 79-2153

ROGER EVANS, individually and as father and next friend of ROBERT T. EVANS, a minor,

Defendants-Appellant.

MOTION FOR STAY OF MANDATE

Pursuant to Rule 41, in furtherance of a Motion of May 30, 1980, and pursuant to Rule 41, Robert T. Evans, Petitioner, now 19 years of age but a minor during most of the litigation time, moves for a stay of the remand pending application to the Supreme Court for a Writ of Certiorari. Petitioner Robert T. Evans further states that he is a citizen of the State of California where he has resided for the past three years, and as a reason for this request in behalf of himself as a person in the status of a young, male Caucasian, wishes to bring before the Supreme Court of his government the need of protection and affirmative action as a member of a minority under Civil Rights protection. Petitioner Robert T. Evans further asserts that in his home state of California, since the *Allan Bakke* decision, there is a common feeling among college students, of which he is now one, that admissions to universities based on race is prohibited. And, Robert T. Evans wishes to go to Washington, D.C. to seek equal rights for all young boys for admission into the Courts of the United States of America under removal provisions regardless of race. That your Petitioner Robert T. Evans wants to and does ask you for

the Stay so that he can apply to the Supreme Court as a California citizen and seek the *equality* of the California University decision in regard to *Allan T. Bakke,* for himself and for a group which would be young, minor, Caucasian males, and for the rights of admission in regard to California Universities applied to the courts that are processing his civil litigation. Petitioner Robert T. Evans is now a student at the University of California at Fresno. Roger Evans joins in this request.

A personal statement by Robert T. Evans in his own handwriting is attached hereto and incorporated by reference to this Motion.

ROBERT T. EVANS
2740 A Lind Avenue
Clovis, California 93612

EUGENE E. KLECAN
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5/31/80

I Robert Evans, hope that the honorable judges who preside in the United States 10th Circuit Court of Appeals will take the time to review the following statement which is written in my own handwriting. At age nineteen I feel I am a responsible, conscientious and sincere person. I am a student at the California State University, Fresno, and at the completion of my freshman year have attained a 3.1 grade point average. I hold a job and contribute to my family and home.

I can honestly say that I feel abused because the opinion of the 10th Circuit Court indicates I have done something wrong in searching the federal courts. I apologize

for whatever it is that I've done which is offensive, but do request that you grant a stay. I have tried to understand all that has occurred in courts dealing with my case since its beginning four years ago. I believe I understand what is said in this document. The thoughts and intentions are of a truthful nature.

I have never had the chance to express my thoughts and concerns in court about this case. I seek the opportunity to do so by appealing to the Supreme Court of the United States.

I clearly read that your opinion states that a particular race only qualifies for admission into the federal judicial system. Discussions in my home state about *Allen Bakke* and the University of California lead me to believe that being born into a particular race means nothing as far as admission into California's universities is concerned. I want to request and ask the Supreme Court why this same idea should not be applied to me in this lawsuit. I am asking you to help me do this by granting my request that you do not finalize this matter in your court but give me the chance to see if the Supreme Court will recognize me and others as being equal with another race in getting into civil rights protection in the federal courts.

In the words of Ralph Waldo Emerson, "Nothing can bring me peace but the triumph of principles" and to me this is a matter of principles.

Sincerely yours,
ROBERT T. EVANS

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* The original of the foregoing statement was in the handwriting of Robert T. Evans, the person whose civil rights were violated. Of necessity, it is here reproduced in printed form.

MAY TERM - June 3, 1980

Before Honorable James T. Barrett, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges

TONY E. MATNEY,
Plaintiff-Appellee,

vs. No. 79-2153

ROGER EVANS, individually and as father and next friend of ROBERT T. EVANS, a minor,
Defendants-Appellant.

This matter comes on for consideration of appellant's motion for stay of mandate in the captioned cause pending timely application to the Supreme Court for certiorari.

Upon consideration whereof, the motion for stay of mandate is granted. The mandate shall be stayed until July 3, 1980, pending certiorari, and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, Clerk
By: ROBERT L. HOECKER
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MARIA ELENA HOLGUIN and JAIME HOLGUIN, husband and wife, and RUTH LEGARDA and ALFREDO LEGARDA, husband and wife,

Plaintiffs,

v. No. 80-221-M Civil

LONNIE DAWSON,

Defendant.

ORDER

This matter comes up for consideration on plaintiffs' motion to remand this action to the Grant County District Court. Plaintiffs claim as grounds for their motion defendant's failure to file a verified petition as required by 28 USC 1446(a), the untimeliness of the filing of the petition, 28 USC 1446(b), and the mootness of defendant's alleged civil rights claim by which he justified removal pursuant to 28 USC 1443(1). Plaintiffs also seek costs incurred in securing remand to State District Court, claiming that the petition for removal is frivolous, vexatious and brought for purposes of delay. For the reasons set out below, the motion to remand will be granted and costs will be awarded against defendant.

The First Amended Complaints filed in this consolidated action set out for the first time the claims on behalf of Jaime Holguin and Alfredo Legarda, husbands of plaintiffs Maria Elena Holguin and Ruth Legarda, the original plaintiffs in these consolidated actions. The husbands' sev-

eral claims set out in those First Amended Complaints later were deleted by way of amendment in a pretrial order "with the exception of the loss of services of [their] wi[v]e[s]." Pretrial Order, ¶8. Contrary to the representation[1] made by defendant in his response to the motion to remand, the husband-plaintiffs did not delete all their claims for relief in the pretrial order, but did so with the clear and unambiguous exceptions set out above. No new claim, therefore, is set out in the pretrial order, as is asserted by defendant as the basis for removal of this action. Because the petition for removal was filed more than thirty days after the filing of the First Amended Complaint, which was the last pleading to raise a new claim on behalf of plaintiffs, the petition is not timely filed. 28 USC 1446(b).

A more precise reason why plaintiffs motion for remand should be granted also derives from 28 USC 1446(b). The original complaint in this action was removable had a timely petition been filed by defendant. As a result, the second paragraph of §1446(b), limited to circumstances in which "the case stated by the initial pleading is not removable," does not operate to permit the petition at this late date. Nor does 28 USC 1441(c) provide removal jurisdiction in this case. Assuming without deciding that the

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[1]Defendant's response quotes a sentence from paragraph 8 of the Pretrial Order as follows: "'The plaintiff, Alfredo Legarda hereby amends Count II of his First Amended Complaint to delete all prayers for relief.' The same deletion occurred as to Jaime Holguin." The response takes the quoted sentence out of context, which misrepresents its effect as to plaintiff Legarda, and flatly misstates the effect of the claimed deletion on the claim of plaintiff Holguin. Whether defendant's misrepresentation of the language in the Pretrial Order is knowing or innocent is a question of serious concern. Given the express language in the Pretrial Order, it is difficult to believe that defendant's argument, which is so far off the mark, is presented in good faith. The sentence quoted, when taken in context, clearly and unequivocally refutes defendant's argument. Only as it is lifted from context in his response can the sentence be relied on by defendant for support, a circumstance which compounds my reluctant apprehension that something here is gravely amiss: Wilful violation of F.R.Civ.P. 11 may subject an attorney to "appropriate disciplinary action."

claims raised by Messrs. Holguin and Legarda in the First Amended Complaint are "separate and independent" claims, they were not joined with "otherwise non-removable claims," which must be the case in order that diversity jurisdiction derive from §1441(c).

Whether or not defendants' alleged civil rights claim is moot, as contended by plaintiffs, it does not provide a basis for removal jurisdiction in this Court. Assuming *arguendo* defendant has raised a viable civil rights claim, it clearly is not directed at plaintiffs to this action but rather toward the administrative and judicial officials of Grant County. It is they, and not plaintiffs herein, who control and administer the jury selection process in the State District Court, and it is they whom defendant must sue, in a separate action, for any alleged civil rights violations. In such a suit, defendant herein would be a plaintiff, to whom the provisions of §1443 do not apply.

Having considered the motion and memoranda of counsel and further being fully advised in the premises, I conclude that defendant's petition for removal is frivolous, vexatious and brought for the purposes of delay. Defendant filed his petition only days before trial was set in this matter in the State District Court and after a motion for continuance on his behalf had been denied. Additionally, I note that this is not the first time that counsel for defendant has attempted the same tactic to avoid an imminent trial setting in the State District Court. *See, Matney v. Evans*, No. 79-2153 (10th Cir., Apr. 24, 1980). Plaintiffs shall be awarded their costs incurred in securing remand of this case to State District Court as a result of my finding that the Petition for Removal was filed in bad faith and for purposes of delay. Costs shall be borne by defense counsel as I conclude that Mr. Eugne E. Klecan, Esquire, and not his client, was the prime mover behind the lamentable tactics employed here. The requests for hearing on this matter, filed by both parties, will be denied. Now, Therefore,

IT IS ORDERED that plaintiffs' motion to remand be, and hereby is, granted.

IT IS FURTHER ORDERED that plaintiffs be awarded costs in the amount of $350.00, such costs to be borne by defense counsel, Eugene E. Klecan, Esquire.

IT IS FURTHER ORDERED that the parties' requests for hearing on this matter be, and hereby are, denied.

E. L. MECHEM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TONY E. MATNEY,
Plaintiff,

-vs-

No. CIV 79 828 M

ROGER EVANS, individually and as father and next friend of ROBERT T. EVANS, a minor,
Defendants.

PETITION FOR REMOVAL

COMES NOW Robert T. Evans and states:

1. That your Petitioner Robert T. Evans is a citizen of the State of California and whose date of birth was March 1, 1961.

2. That your Petitioner, Robert T. Evans is removing Cause No. 12-76-05920, a civil action in Bernalillo County, New Mexico.

3. That this Removal is pursuant to Section 28 USCS § 1441 (a)(b)(c). That the action removed is founded on law of the United States and is thus authorized in particular by 28 USCS § 1441 (b).

4. That the law of the United States on which the action was based is Section 42 USC 2651-2653 and is expressly pleaded as such in the Amended Complaint (Exhibit A, attached).

5. That pursuant to 28 USCS §1441(c) the entire case is removed. That the claimed amount under 42 USC 2651-2653 is in excess of $25,000.00.

6. That the Amended Complaint stated a violation of 42 USC 2651-2653 for the first time, as the same was not a part of the original Complaint.

7. That the claim under 42 USC 2651-2653 is for the United States of America. That on or about September 27, 1979, Robert T. Evans, your petitioner, received a Notice of Trial in Bernalillo County, New Mexico, a copy of the Notice is attached hereto as Exhibit B. That this removal is within thirty days as stated in Section 1446.

8. That your petitioner was a minor, age 15 years, at the time of the accident alleged in the Amended Complaint and now living with his mother, Mona Evans in the State of California, with whom he has resided continuously since the completion of the spring school term of 1977. The parents of your petitioner had been divorced for many years with custody with the mother, Mona Evans, by court decree. Robert T. Evans became 18, March 1, 1979 and has been a citizen of the State of California. That Plaintiff, Tony Matney has been a citizen of the State of Indiana.

9. That a copy of the amended Complaint was never served upon the petitioner, Robert T. Evans at any time and said petitioner has never answered the Amended Complaint nor has anyone ever accepted service for the Petitioner or answered the Amended Complaint.

10. That shortly after September 27, 1979, Petitioner received Notice of contents of the Order that he was being ordered to trial and that a personal judgment was being sought against him on the Amended Complaint. See Exhibit B. Petitioner Robert T. Evans brings this Removal within 30 days of having received an "Order", that the Amended Complaint "is one which is or has become removable", 25 USCS §1446.

11. That the State District Court trial proceeding as scheduled (Exhibit B) will proceed seeking a personal

Judgment for compensatory and punitive damages against the Petitioner despite the lack of necessary procedures as stated above.

12. That in addition your petitioner who was a minor at all times until March 1, 1979, has been sued originally by his name Robert T. Evans, but plaintiff hereir has abandoned that Complaint and is acting under Section 42 USC 2651 and against Roger Evans, the father and next friend of this Petitioner.

13. There is thus a change in parties although your Petitioner's personal liability on a Judgment is sought. The change of designation of parties requires service which is lacking.

ADDITIONAL OR ALTERNATIVE GROUNDS FOR REMOVAL

1. Petitioner claims removal also based on 28 USCS §1443.

2. Petitioner, Robert T. Evans verily believes that he was discriminated against because of his youth as being of that class which is presumed by state police officials and or judicial officials to be guilty of criminal acts because of his youth.

3. This deprived him of a constitutional jury trial because the judicial officials have barred him from his day in court and from a jury in his community which would include persons of all ages including young persons 18 and over.

4. By the denial of a trial by jury, your petitioner has been subjected to the opinions of police and law enforcement officers including judicial officers who accepted solely the "opinion" of police officers as absolutely con-

clusive of guilt. This does not occur with other people and classes and thus your Petitioner verily believes is a result of discrimination and prejudice against a class i.e. male persons in their early teens and deprives them of their civil rights in violation of justice.

5. That the above is a ground for removal under Section 1443.

6. In justification of the Summary Judgment, we find the following: "The investigating officers were of the opinion that the bicycle was struck from the rear" by the petitioner. Plaintiff did not testify because of claimed amnesia and there were no witnesses. In holding against the defendant the "opinion" of the police was escalated into an absolute conclusion barring a jury trial and day in Court by petitioner.

7. There were other instances involving discrimination in deprivation of Petitioner's constitutional rights and because of his youth as Petitioner verily believes.

8. That the judicial officer granting summary judgment in violation of petitioner's rights viewed the bicycle involved in the accident in a summary judgment hearing and concluded liability against the petitioner. The judge thus conducted his own trial with unknown interpretations of physical evidence in violation of the Rules of Procedure in a Summary Judgment. Petitioner verily believes that the conclusions against him were the result of discrimination as to his age. Removal under Section 1443 is proper.

That as an additional and/or separate grounds for removal Petitioner bases removal under 28 USCS § 1443, Petitioner states:

1. That equality was denied as to Robert T. Evans and as Roger Evans in the method of selection of a trial judge in the County of Bernalillo, State of New Mexico, follow-

ing a recusal by the original trial judge who was selected by the "random selection" method of assigning judges to civil lawsuits filed in the District Court of Bernalillo County, New Mexico.

2. That the method used in violation of due process was to reassign the case to those judges which had been disqualified the most or had recused themselves most often. In other words, rather than to give the petitioner herein an equal chance to obtain any of the twelve district judges by the "random selection" method in use for the initial selection, the clerk's office kept quantitative records of each judge's disqualifications and recusals and supplied the newly assigned judge from the rejected or recused pool.

3. This method in a county where judges were elected by popular vote is a discrimination against Petitioner by rejecting the "random selection" method.

4. That petitioners were unequally treated and thus per se deprived of a civil right under 28 USCS §1443, since within thirty days of the not "random" method used as to your petitioners, other litigants in Bernalillo County were accorded the "random selection" method of a new selection when the original judge assigned to the case was disqualified or recused himself. That after other litigants were accorded the "random selection" method the judge assigned to the instant case, when the original judge recused himself, refused to allow the "random method" to be applied in this case. That a right to removal exists under §1443.

5. That this removal is within 30 days of the Order setting the trial whereby Petitioner Robert T. Evans in his personal capacity and Roger S. Evans would be held liable in a Judgment without a jury trial or other procedural step being granted to them as is granted to other litigants on the issue of liability.

6. That the value of the matter in controversy in said action, exclusive of interest and costs, exceeds $10,000.00.

7. That the effect was to force upon petitioner a judge from a class of judges which had been rejected. It was systematic discrimination against the petitioners.

The Due Process and Equal Protection of the Laws under the 14th Amendment to the Constitution of the United States would apply and guarantee a right of removal for a violation of the civil rights to the entire class discriminated against, which violation by a Law of the United States is applicable to a group within the class.

For the reasons stated above, individually and collectively, your petitioner removes said Cause No. 12-76-05920 from the District Court of Bernalillo County to the United States District Court for the District of New Mexico.

WHEREFORE, Petitioners filed this petition for removal of said action from Bernalillo County District Court, New Mexico, to the United States District Court for the District of New Mexico and prays that said action stand so removed.

Klecan & Roach, P.A.
Janet Santillanes
Eugene E. Klecan
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APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TONY E. MATNEY,

Plaintiff,

-vs- No. CIV 79 828 M

ROGER EVANS, individually and as father and next friend of ROBERT T. EVANS, a minor,

Defendants.

MOTION

COMES NOW the Plaintiff, Tony E. Matney, by his attorneys, Robinson, Stevens & Wainwright, and respectfully moves that the Petition for Removal filed herein by the Defendants be summarily dismissed, and the case be immediately remanded to the District Court of the Second Judicial District, Bernalillo County, State of New Mexico, pursuant to the provisions of 28 USC, Section 1447(c), upon the basis that it appears that the case was removed improvidently, without jurisdiction, and that it did not follow the procedures for removal provided by 28 USC, Section 1446, in that the Petition shows on its face no basis for granting the Petition, and that Exhibit "B" attached to the Petition is merely the trial calendar of Honorable James A. Maloney and is not an "initial pleading" contemplated by Section 1446(b).

In support of this Motion for remand, the Plaintiff attaches hereto the Affidavit of Paul W. Robinson and Paul S. Wainwright, to which further attachments are made, all of which establish that as a matter of law the Petition for Removal should be immediately denied.

All costs herein should be assessed against the Defendants.

WHEREFORE, Plaintiff prays that the Petition for Removal be immediately denied and that the case remanded for proceeding before the Second Judicial District Court, County of Bernalillo, State of New Mexico.

Robinson, Stevens & Wainwright
By: Paul W. Robinson
Attorneys for Plaintiff
20 First Plaza, Suite 413
P. O. Box 787
Albuquerque, New Mexico 87103
Tel. 243-6777

I hereby certify that a true copy hereof was hand-delivered to opposing counsel of record this 29th day of October, 1979.

Gregory V. Pelton